(19)

No. 90-1912

In The

Supreme Court of the United States

October Term, 1991

STEPHANIE NORDLINGER,

Petitioner,

v.

KENNETH HAHN, in his capacity as Assessor for the County of Los Angeles and the COUNTY OF LOS ANGELES,

Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California

MOTION FOR PERMISSION TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE UNITED STATES JUSTICE FOUNDATION AND JAMES V. LACY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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MOTION OF THE UNITED STATES JUSTICE FOUNDATION AND JAMES V. LACY FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

The United States Justice Foundation (the "USJF") and James V. Lacy (collectively "Amici") move pursuant to Rule 37 of the Rules of this Court for leave to file the accompanying brief as *amici curiae* in support of respondents. Amici sought written consent from petitioner and respondents; respondents consented, but petitioner refused. Amici filed respondents' written consent with the Clerk of the Court.

Amici include Mr. Lacy and the USJF. Mr. Lacy was a close associate and advisor to Howard Jarvis, the co-author of Proposition 13, during the campaign to adopt the initiative. The USJF, a non-profit California corporation, was founded in 1979 by supporters and a former associate of Howard Jarvis, and is dedicated to the preservation of property, civil and human rights. The interests of movants as *amici curiae* are more fully described in the accompanying brief (pp.3-4).

Amici have devoted much of their professional efforts to promote the principles and policies of Proposition 13. Amici's active involvement in the evolution of Proposition 13, enable them to provide this Court with an important perspective. In its brief, Amici address the general question of the equal protection challenge to Proposition 13, and specifically discuss the constitutional implications of the similarity of Proposition 13's formula for property taxation and the formula used by the Internal Revenue Service.

In addition, Amici discuss the importance of maintaining the independence of state tax systems and the likely consequences of this Court's interference with Proposition 13.

Amici respectfully request leave to file this brief as *amici curiae* in support of respondents.

Respectfully submitted,

Dated: January 31, 1992

/s/ JAMES V. LACY

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No. 90-1910

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STEPHANIE NORDLINGER,
Petitioner,

v.

KENNETH HAHN, ET AL.,
Respondents.

BRIEF *AMICI CURIAE* OF THE UNITED STATES JUSTICE FOUNDATION AND JAMES V. LACY IN SUPPORT OF RESPONDENTS

THE UNITED STATES JUSTICE FOUNDATION AND JAMES V. LACY SUBMIT HEREWITH THEIR BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS.

I. INTERESTS OF THE *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the United States Justice Foundation, a California corporation (the "USJF") and James V. Lacy, an individual, submit the following brief *amici curiae* in support of respondents Kenneth Hahn and the County of Los Angeles.

The USJF is a non-profit, tax-exempt California corporation, dedicated to the preservation of property, civil and human rights. The USJF was founded by supporters and a former associate of Howard Jarvis, the co-author of Proposition 13. The USJF has been active in defending tax limitation proposals in California and throughout the United States. With the assistance of volunteer lawyers, the USJF regularly represents individuals and classes on a *pro bono publico* basis, not only redress individual acts of injustice, but also to promote the fairness of governmental conduct and important public policy concerns.

James V. Lacy is a native of California who has dedicated his working career to reducing the size of government. Mr. Lacy served as a principal aide to Howard Jarvis during the Proposition 13 campaign where he helped qualify and pass the initiative. Mr. Lacy also provided legal advice during the implementation process for Proposition 13. He is in a position to bear witness as to the issues and policy concerns that were discussed during the campaign to adopt and implement Proposition 13. After passage of Proposition 13, Mr. Lacy helped found the USJF to insure, among other important purposes, that the spirit and intent of Proposition 13 would be defended and maintained. Most recently, Mr. Lacy served in the Bush Administration as Chief Counsel for Technology in the Department of Commerce.

II. SUMMARY OF THE ARGUMENT

In June, 1978, California voters amended their Constitution to include Article XIII A, commonly known as Proposition 13. Proposition 13 is a historic measure aimed at increasing governmental accountability and improving fiscal responsibility by altering the way property is taxed in California.

Before Proposition 13, property taxes were based on annual current market assessments and fluid tax rates which resulted in unpredictable fluctuations in taxes. Worse, property owners were taxed on the unrealized gains in the value of the property. Individuals often faced the choice of borrowing against their home to pay the property tax or selling their home. Because borrowing against a home is difficult for persons with fixed or low incomes, the pre-Proposition 13 tax system resulted in many people being taxed out of their homes.

As explained by the California Supreme Court in affirming its constitutionality, Proposition 13 "consists of four major elements: a real property *tax rate* limitation (§1), a real property *assessment* limitation (§2), a restriction on *state* taxes (§3), and a restriction on *local* taxes (§4)." *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal. 3d 208, 231 (1978) (emphasis in original). Each provision is "interrelated and interdependent, forming an interlocking 'package'. . . to assure real property tax relief." *Id.* Under Proposition 13, California property owners are no longer taxed on the unrealized gains of their property, and the

maximum rate of taxation is fixed. With Proposition 13, California discarded its former current-value tax system and enacted an acquisition value tax system in which the tax basis is the purchase price of the property instead of the annual current-value assessment.

This acquisition value tax system treats property like the Internal Revenue Service treats property. Pursuant to the Internal Revenue Code ("IRC"), the basis of a capital asset is the purchase price, and tax is imposed only when the asset is sold or "realized." *See* 26 U.S.C. §1001. Similarly, Proposition 13 uses the purchase price as its basis for taxation and allows for a 2% annual increase of the tax basis to insure that local governments have adequate and ever-increasing revenues. Additional revenues can be obtained with voter approval. Using this relatively fixed tax basis, the government then taxes property at a rate of 1% each year.

Proposition 13's formula has remained overwhelmingly popular with the electorate in California for the past 13 years. The instant case is a challenge by the same entities who opposed Howard Jarvis, Paul Gann and the California voters in 1978. This time, Proposition 13's opponents are cloaking their opposition to the policies and fiscal consequences of Proposition 13 in the garb of a constitutional challenge. This litigation is an attempt to gain in the courtroom what these groups have consistently lost at the ballot box.

While intelligent people may disagree as to the most productive manner of taxation, such issues should be resolved by the electorate and the popularly-elected legislature, not an independent federal judiciary. Petitioner and supporting *amici* have equal access to the initiative process and could repeal Proposition 13, but the initiative process is precisely what petitioner and supporting *amici* object to.

Traditionally, this Court has deferred to states the ability to tax their own people. While California's tax policy may differ from other states, it is this freedom of the states to adopt different state policies that is at the core of our federal system of government. In *McCulloch v. Maryland*, 17 U.S. 316 (4 Wheat 1819), Chief Justice John Marshall wrote:

> [T]he power of taxing the people and their property is essential to the very existence of government, and may be

legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may chuse [sic] to carry it. The only security against the abuse of this power, is found in the structure of the government itself. *Id.* at 428.

If this Court strikes down Proposition 13, it strikes at the heart of the federal system. If we are to maintain our federal system, states, with the consent of their people, must be allowed to make independent decisions concerning taxation.

To overcome the strong presumption of deference to states in tax matters, petitioner must show a constitutional violation, not merely a disparate impact from a tax system which is neither arbitrary nor capricious. If this Court treats policy arguments as constitutional violations, it will open the floodgates of litigation to continued challenges concerning state tax issues and this Court will have to reallocate scarce federal judicial resources toward the creation of an omnibus property tax review court. If the Court chooses to move in this direction, it should hire a slew of assessors and surveyors, purchase a gaggle of green shade visors and sign up for some frequent flier programs, because if Proposition 13 is unconstitutional because of difference in assessment levels, then so too is every other state property or sales tax and this Court will become the final arbitrator of each state and locality's tax policy.

III. PROPOSITION 13 DOES NOT VIOLATE THE CONSTITUTION'S EQUAL PROTECTION CLAUSE.

Petitioner claims Proposition 13's method of property tax assessment violates the equal protection clause of the Constitution.[1] Petitioner asserts that Proposition 13 merely grafted a "welcome stranger" component onto the former current-value scheme of property taxation and therefore discriminates against people who move to California. Petitioner's Brief at 2, 14-16. Specifically, petitioner alleges that newcomers to California do not receive the same tax treatment as people who already own property because the

[1] Petitioner does not challenge the 1% tax rate cap or any other feature of Proposition 13. Petitioner's Brief on the Merits ("Petitioner's Brief") at 2, fn.1.

newcomer's baseline tax assessment year is more recent than the baseline year of those already owning property.[2] Petitioner argues that this results in an unconstitutional denial of equal protection.

This argument, however, entirely lacks merit. Proposition 13 treats all similarly situated taxpayers the same — regardless of whether they are recent arrivals to the state or natives buying a new residence. Nothing in the equal protection clause or related Court cases requires state property taxes to produce equal results; rather, there must be "rough equality in tax treatment of similarly situated property owners." *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*, 488 U.S. 396, 343 (citing *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526-27 (1988). The California Supreme Court found such "rough equality" to exist when it considered the constitutionality of Proposition 13: "[Proposition 13] introduces a roughly comparable tax system with respect to real property, whereby the taxes one pays are closely related to the acquisition value of the property." *Amador Valley*, 22 Cal. 3d at 236.

Not only does Proposition 13 create "rough equality," but any resulting disparity is a consequence of the state's attempt to avoid the grossly unfair annual fluctuations and unrealistic burdens placed on taxpayers under the prior system. Before Proposition 13, California taxed property owners on the current-value of their property, even though they could not realize the ever-increasing value of their property until it was sold. Property owners who could not afford to sell their property and realize their gain were perennially taxed on "assets" they would never possess. It was precisely this unfair treatment of similarly-situated property owners that in part prompted the California voters to adopt Proposition 13.

A. PROPOSITION 13 DOES NOT CREATE A SUSPECT CLASSIFICATION.

Petitioner's initial claim is that Proposition 13 improperly creates and unfairly taxes a class of taxpayers, namely recent arrivals to the state. This is not true. Proposition 13 simply does not

[2] For example, if two identical parcels of land were bought two years apart in a rapidly appreciating market, the person who bought first would likely have a lower property tax assessment than the person who bought two years later.

create a suspect classification. Under Proposition 13, tax assessments are tied to the property, not to the individual. Pursuant to this acquisition value tax system, long-time residents who purchase land this year are treated in exactly the same manner as recent arrivals who purchase property this year.

Petitioner's argument relies in part on *Allegheny Pittsburgh*, which held that under a state scheme of property taxation, property owners must be treated in a similar manner. 488 U.S. at 343. Petitioner asserts that the Webster County taxation scheme struck down in *Allegheny Pittsburgh* is virtually identical to Proposition 13 and should likewise be found unconstitutional. Petitioner's Brief at 11. However, this Court did not find that the property tax scheme in West Virginia created suspect classifications. *Id.* at 345. Rather, the Court found that the West Virginia tax system violated the equal protection clause because the county assessor violated the West Virginia constitution and the assessors's own administrative regulations by applying the tax classifications in an arbitrary manner. *Id.* Significantly, this Court accepted as constitutional the underlying basis of an acquisition value tax system. *Id.* at 343.

In *Allegheny Pittsburgh* this Court held that the *administration* of the West Virginia tax system to be unconstitutional — not the *system* itself. This Court ruled against Webster County because the actions of a rogue assessor violated the West Virginia constitution. This Court cited violations of the state constitution and improper administrative practices which infringed upon the equal protection clause. 488 U.S. at 345. Nowhere in Petitioner's Brief, however, does she allege that any California official has acted arbitrarily, capriciously or in violation of Proposition 13's guidelines and rules in administering property taxation pursuant to Proposition 13.

Petitioner's second equal protection argument is that Proposition 13 creates an unconstitutional barrier to travel between states. In support, petitioner cites *Zobel v. Williams*, 457 U.S. 55 (1982), in which this Court arguably strengthened its test for evaluating equal protection claims. Even under *Zobel*, however, Proposition 13 survives the equal protection and barrier to travel challenges.

Zobel challenged the constitutionality of an Alaskan statutory scheme to distribute income, in varying amounts, based on the length of each citizen's residency. *Zobel*, 457 U.S. at 56. While

petitioner admits that property ownership is not equivalent to residency, she attempts to analogize the two. Petitioner's Brief at 40. This analogy is inappropriate. Property ownership is not closely linked to residency. Many long-time California residents will never purchase property, while recent arrivals to California often purchase property immediately. Every day long-time property owners sell their homes and purchase another, just as new arrivals do. *Zobel* was concerned with *permanent* classifications of people — a system that does not exist under Proposition 13. *Zobel*, 457 U.S. at 59. The classifications under Proposition 13 are fluid and are not aimed at any particular group of people. To the contrary, *any* individual, whether a resident or out-of-state arrival, who buys property is subject to the *same* tax treatment. Without permanent classifications, there is no equal protection violation.

Zobel's equal protection claim rested on the ground that Alaska's statute unfairly created a barrier to travel. Yet empirical data effectively demonstrates that Proposition 13 is not a barrier to travel. As a long-time California resident, petitioner must be aware of the population explosion that has occurred in the past 13 years.[3] This enormous population growth certainly cuts against any claim that Proposition 13 has complicated migration to California. Moreover, to the extent that Proposition 13 discourages migration, its burden is shared by any long-time resident who similarly buys property. Unlike the petitioner in *Zobel*, long-time California residents and new arrivals to California are treated in exactly the same manner. Burdens and benefits are received equally by all similarly situated individuals.

B. ANY CLASSIFICATIONS UNDER PROPOSITION 13 ARE NOT ARBITRARY AND CAPRICIOUS AND ARE JUSTIFIED BY PROPOSITION 13'S RATIONAL AND VALID POLICY OBJECTIVES.

As noted above, this Court in both *Allied Stores* and *Allegheny Pittsburgh* held that a state has the power to impose and collect

[3] In 1978, the population of California was 22,836,000 and by 1990, the population had grown to 29,976,000. *California Statistical Abstract*, 10 (1991).

taxes and that it *may* tax property at different rates. Although Proposition 13 does *not* create any suspect classifications because it treats all similarly situated people alike, it does create different classes for purposes of tax collection for different people in different situations which are *unrelated to length of residency*. However, this Court consistently holds that states may create different classes for tax collecting purposes as long as the classifications are neither "capricious nor arbitrary and rest under some reasonable consideration of difference and policy." *Allegheny Pittsburgh*, 488 U.S. at 344, 359 (citing *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573, (1910)).[4] To find Proposition 13 unconstitutional, petitioner must show that any classification method under Proposition 13 is both arbitrary and capricious and that there are no underlying policy reasons for the transition from the former current-value tax system to an acquisition value method of taxation.[5]

In 1991, this Court ruled on two cases regarding a state's ability to create classifications. In *Leathers v. Medlock*, 111 S. Ct. 1438 (1991), this Court upheld Arkansas' ability to impose a sales tax on cable television, but not on printed matter. The Court wrote: "[i]nherent in the power to tax is the power to discriminate in

[4] Petitioner lists numerous "unfair" elements of the Proposition 13 system and she rests her "constitutional" challenges on these charges. The most prominent charge is the supposed unfairness between those individuals who have owned their property since 1978 and more recent purchasers. Petitioner asserts that certain subsequent amendments to Proposition 13 have created a "caste," individuals who have owned their homes since 1978 and will be able to take full advantage of Proposition 13. Petitioner's Brief at 21. Although there is still a substantial number of these individuals, petitioner's own study demonstrates that this number is declining rapidly and will soon represent an insignificant portion of the property tax-paying public. Petitioner's Brief at 19. Joint Appendix at 46.

[5] Such classification is no different than that which may occur under sales taxation. The California Supreme Court observed in *Amador Valley*: "the fact that two taxpayers may pay different taxes on substantially identical property is not wholly novel to our general taxation scheme. For example, the computation of a sales tax on two identical items of property may vary substantially, depending upon the exact sales price and availability of a discount." *Amador Valley*, 22 Cal. 3d at 235-36.

taxation. 'Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes. *Id.* at 506.'" (citing *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547 (1983)).

In *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), the Court recognized the constitutional presumption which favors the state in its ability to make classifications. In *Gregory*, this Court upheld the Missouri constitution's age qualification for its policy-making officials, stating that a petitioner has the burden to disprove the validity of the underlying policy reasons for a particular classification. The Court held that "[a] state 'does not violate the equal protection clause merely because the classification made by its laws are imperfect.' [citations] In an equal protection case of this type . . . those challenging the judgment [of the people] must convince the court that the . . . facts on which the classification is apparently based could not reasonably be conceived to be true by the decisionmaker." *Id.* at 2407-08 (citing *Vance v. Bradley*, 440 U.S. 93, 111 (1979)).

This presumption, combined with the historical deference shown toward state tax regimes in general, creates a high standard for petitioner to meet. As will be demonstrated below, petitioner fails to show that Proposition 13 classifications are arbitrary or capricious or that the underlying policy reasons for Proposition 13 are unreasonable or invalid.

1. ***Proposition 13 eliminates any hint of arbitrary or capricious actions by the State.***

Under Proposition 13's acquisition value tax system, property purchasers are now in a position to more accurately determine their property tax assessment in advance because the purchase price instead of an assessor's disparate calculations determines the tax basis. As mentioned earlier, Proposition 13 treats property as a capital asset with a tax basis equal to the purchase price, similar to the basis rules for property outlined in the IRC.

Pursuant to Proposition 13, reassessment for tax purposes occurs only at sale or realization. Similar to the situations in *Allied Stores* and *Brown-Forman*, the state sets a standard and an individual decides whether to participate and at what price. Under the former current-value tax system, the state taxes an individual on the

unrealized gain of the property as perceived by the assessor whose calculations may very well be both arbitrary and capricious. Under Proposition 13, such risks are eliminated because the taxpayer and the free market control both the timing of realization and amount of tax assessment by means of a sales price.

This Court has examined the constitutionality of taxation on unrealized gains. In *Eisner v. Macomber*, 252 U.S. 189 (1920), the Court held a tax on unrealized gains unconstitutional. While this Court in *Commissioner v. Glenshaw Glass*, 349 U.S. 426 (1955) distinguished *Macomber*, the Court still held that the IRC formula, outlined in 28 U.S.C. §1001 that taxes on realization of the asset, was a proper administrative rule, if not a constitutional requirement. Marvin A. Chirelstein, *Federal Income Taxation* ¶ 5.01 (4th. ed. 1985).

Moreover, taxation on realization is a more equitable tax treatment for property. Income tax, sales tax, user tax or any other commonly used form of taxation allows an individual a degree of control over his or her tax burden. These taxes divert money to a government entity by providing the state with a portion of the money an individual will receive or requires an individual to pay for a particular service. Such tax is called a "cash-flow" tax. A property tax, on the other hand, is traditionally a "portfolio" tax — it taxes people according to assets they have in their "portfolio" which they may or may not have realized.[6] Proposition 13 attempts to shift property tax from a portfolio tax to a cash-flow tax.

The unique characteristics of property justify the tax system envisioned by Proposition 13. Unlike income, property often does not generate cash-flow. Land and building values are locked into the physical or aesthetic nature of the edifice or soil. A property tax based on perceived current-value and a ready buyer with available

[6] Economists have generally agreed that the one of the greatest problems affecting a tax on unrealized gain concerns liquidity. With paper gains, a person is put in the situation of borrowing against the asset or selling. Chirelstein, *supra*. In a tight credit market, the costs and difficulty of financing a tax burden will force people to sell their homes.

cash or financing makes assumptions that are often invalid.[7] A taxpayer under such a current-value system is subject to arbitrary and sporadic tax increases where the taxpayer has no control and is thus potentially subject to the capricious demands of the state.

Moreover, the determination of tax assessments under a current-value system can be arbitrary. "The difficulty of making annual property appraisals may be the chief reason for [taxing at realization]; the absence of ready cash to pay the tax on property appreciation and the consequent 'forced liquidation' of assets to meet tax obligations is another." Chirelstein at *supra* p. 12; *see also* William A. Klein, Boris I. Bittker & Lawrence M. Stone, *Federal Income Taxation*, 302-03 (7th ed. 1987). Tax assessing is an inexact science in that a particular property may have a multitude of different values. Property may be valued according to its replacement value, rental value, historical value, current market value, selling price, buying price or aesthetic value. See 1 California State Board of Equalization, *Property Taxes Law Guide*, §§200 et. seq.; Kenneth A. Ehrman & Sean Flavin, *Taxing California Property* (3rd. ed. 1989) §§12.01 et. seq.

Finally, in California, the county assessor is an elected official who may lower the assessments of his or her political friends and raise the assessments of his or her political foes.[8] Discrepancies in assessment techniques can create huge disparities in tax burdens that would be imposed on an unwitting taxpayer without warning or notice. Only under an acquisition value regime does the state have a

[7] For example, unlike individual stocks in an investment portfolio, it is difficult to subdivide and sell a portion of a residential property for cash to pay a tax bill. Zoning laws may preclude it and a buyer may not be available for such a small portion of land.

[8] County assessors have been accused of favoritism in the assessment of property. While nearly all assessors are honest, such accusations create public skepticism. A former Los Angeles County assessor prior to Proposition 13 encountered such accusations. *See*, Robert Rawitch, "Suit Seeks to Block Tax on Mystery Ship," L.A. Times, Aug. 19, 1975, pt. I at 3; "Watson Accused of Overvaluing Property in County," L.A. Times, Oct. 19, 1972, pt.II at 1. Doubts concerning the validity of property assessments are reinforced by the different methods of valuation.

guaranteed, more evenly-distributed assessment system that provides property owners some degree of certainty of future tax burdens.[9]

2. ***Proposition 13's valid policy objectives justify its tax classifications.***

As noted above, this Court defers to states and their ability to impose taxes on its electorate. *Allegheny Pittsburgh*, 488 U.S. at 344 (citing *Allied Stores*, 358 U.S. at 526-27); *see also Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973). Differences in treatment between taxpayers do not violate the equal protection clause where such differences are rooted in valid state policies. *Kahn v. Shevin*, 416 U.S. 351, 355 (1974); *State Board of Tax Commissioners of the State of Indiana v. Jackson*, 283 U.S. 527, 537 (1931). Thus, even if this Court finds that Proposition 13 does create certain classifications, the underlying policy objectives and general deference to the states in tax matters justify such classification.

The policy objectives of Proposition 13 are not only valid, but Proposition 13 demonstrably produces a fairer and more efficient system of property tax. Prior to Proposition 13, local governments established a budget and then set the tax rate on all taxpayers. As a result, property taxes fluctuated on a yearly basis. Theoretically, some years the rate would increase and other years the rate would drop. Empirically, however, the amount of tax always increased. Local governments had no restrictions on their spending and could fund whatever projects they chose by raising property taxes. Government essentially had a blank check to set tax rates and increase property assessments. Proposition 13 took away this checkbook by fixing the amount of revenue available to local government.

In 1977, property taxes represented a much greater percentage of a local government's budget than today. *See, California Taxing and Spending*, Cal-Tax News, Feb. 15, 1991, at 3-6. Under the prior system, property owners paid for government services according to

[9] Proposition 13 was adopted in 1978 and it has been interpreted by over 100 California court decisions. Today, it is still the subject of interpretation by the California Supreme Court. See e.g., *Pacific Southwest Realty Co. v. County of Los Angeles*, 91 Daily Journal D.A.R. 16018, (December 30, 1991).

the value of their property. But under Proposition 13, property taxes constitute a smaller percentage of total governmental revenues because other sources have been created to fill any gaps. These sources draw from the whole taxpaying population which creates a more progressive overall tax burden in California and distributes the cost of government services more evenly. In fact, an independent Rand Corporation study evaluated the impacts of the California and New Jersey property tax revolts. In both cases, the progressivity of the total state tax burden increased with the new property tax systems, especially in California. *See* Dennis De Tray & Judith Fernandez, *Distributional Impacts of the Property Tax Revolt*, 43 Nat'l Tax J. 435, 445 (1990). Today, taxes are imposed generally on those with the ability to pay, contrary to the pre-Proposition 13 system. Now that Californians have greater input into how their money is spent, property tax has become a fixed, predictable revenue source like sales or income tax, rather than a fluid revenue source which would fluctuate to fill any deficit.

Petitioner and supporting *amici* contend that local governments have been stifled as a result of the effective spending limitations imposed by Proposition 13. This is untrue. Local governments have successfully found alternate sources of revenues and the voters have provided additional revenues for desired services and projects. *Amici* Brief of the American Planning Association and the California Chapter of the American Planning Association ("Planners Brief") at 19; *Amici* Brief of the Building Industry Association of Southern California, Inc. and the National Association of Home Builders ("Builders Brief") at 4. California voters prefer this control. Since 1978, not one anti-Proposition 13 measure has qualified for the ballot in California despite the fact that these *amici* have access to the initiative process.

It is precisely this decision of the people to which petitioner and supporting *amici* object. Although new revenue sources have been created to meet revenue shortfalls resulting from Proposition 13, petitioner and supporting *amici* simply do not favor these alternatives. *Amicus* Brief of the League of Women Voters of California ("League Brief") at 9-10; Builders Brief at 5; Planners Brief at 23; and *Amicus* Brief of the International Association of Assessing Officers ("Assessors Brief") at 12-13. Petitioner and supporting *amici* in effect argue that they know what is good for California, not the voters. Therefore, petitioner and supporting *amici* are hoping to

deceive this Court with policy arguments masked as "constitutional" challenges to achieve in the courtroom what they have been denied at the ballot box.[10] See, e.g., Assessors Brief at 18.

The League Brief is especially egregious because it constitutes a frontal attack on direct democracy. The League of Women Voters of California (the "League") acknowledges that it is asking this Court to destroy our federal system of government. *Id.* at 4. The League argues that since Proposition 13 was an initiative, the rawest and most direct form of democracy, heightened scrutiny must be exhibited by this Court. League Brief at 13. The League and other supporting *amici* state that the California voter is not sophisticated enough to understand the ballot measures. League Brief at 13, fn.10. They assert that the voters are unaccountable and unenlightened, unlike supporting *amici* which have "pure" motives. Builders Brief at 13 (fees complicate and increase the costs of their industry); Planners Brief at 10-11 (any reduction in revenue or the size of government would reduce the need for their services); and Assessor Brief at 18-20 (which recommends annual reassessment programs). Not only is this insulting to the California voter, but in a democracy, it is precisely initiatives like Proposition 13 which should be given greater deference because they represent the clear choice of the voters in a matter which is clearly of a legislative nature.

A weak link in our democracy has been the politicians' extravagance with public funds, in combination with their special ability to avoid public accountability. Individually, all government spending programs appear plausible; someone will always benefit. But collectively, unfettered spending grows, creating a national debt, huge taxes and public resentment. Twice in American history has this phenomenon prompted drastic and decisive outbursts of citizen indignation. The first event was the Boston Tea Party and the second was Proposition 13. Moreover, Proposition 13 has been found constitutional at every state court level. It has existed for 13 years and no political force has been able to dent its approval. The effects of Proposition 13 are evident daily in the form of increased

[10] "Supporting Nordlinger's appeal, the League of Women Voters of California said the high court should address [Proposition 13] because 'the political realities are such . . . that a political solution is not practical.'" Dori Meinert, "High court will rule on Prop. 13," S.D. Union, Oct. 8, 1991, Sec. A, 1.

fees and sales taxes. See generally, the supporting *amici* briefs. Nevertheless, Proposition 13 remains popular to the overwhelming majority of Californians. This Court must not be led astray by a vocal minority attempting to use the court system for personal and political gain.

IV. UNDER THE FEDERAL SYSTEM OF GOVERNMENT, CALIFORNIA HAS THE RIGHT TO ESTABLISH ITS OWN TAXATION SYSTEM

Federalism demands a balance between federal and state power. A dual sovereignty between the state and national governments exists today and numerous court decisions recognize this fundamental principle. In *Gregory*, this Court reaffirmed the importance of states and the constitutional requirement to protect their independence. The Court wrote that "the maintenance of [state] governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Gregory*, 111 S.Ct. at 2399 (quoting *Texas v. White*, 74 U.S. 700 (7 Wall. 1868) (quoting *Lane County v. Oregon*, 74 U.S. 71, 76 (7 Wall. 1868))).

The preservation of the states, through limited government, is rooted in the text of the Constitution itself. The tenth amendment to the Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Such a provision insures a form of decentralized government that can respond more quickly and appropriately to the ever-changing needs of society. States have been universally recognized as "laboratories" for social policy and many of the national programs enacted by Washington first received their genesis in a state capitol. *Gregory*, 111 S.Ct. at 2399.

But perhaps the most significant benefit of federalism lies in its check on the abuses of power in general. "The 'constitutionally mandated balance of power' between the States and Federal Government was adopted by the Framers to ensure the protection of our 'fundamental liberties.'" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, (1986) (quoting *Garcia v. San Antonio Metropolitan*

Transit Authority, 469 U.S. 528, 572 (1985) (Powell, J., dissenting). This balance between our state and national governments insures that no one entity accumulates enough power to threaten our democracy.

A. FEDERAL JUDICIAL INTERFERENCE WITH PROPOSTION 13 IMPROPERLY VIOLATES THE CONSTITUTIONAL PRINCIPLE OF FEDERALISM.

A precarious balance exists between the states and the national government, in large measure, due to the national government's decided advantage under the supremacy clause of the Constitution and the wide powers obtained through this Court's interpretation of the commerce clause. See U.S. Const. Art. VI and Art. I, §8, cl.3. Yet, as long as each branch of the national government acts within its powers, the federal system will remain intact. This was the Court's reasoning in *Gregory* when it held that a Congressional statute did not supersede the Missouri state constitution regarding the qualifications of its elected officials. *Gregory*, 111 S.Ct. at 2408. In *Gregory*, this Court held that the independence of states is tied to their ability to create the qualifications for their officeholders. 111 S.Ct. at 2400. This Court held that it was incumbent on Congress that, if it desired to override a provision of a state constitution that was so closely identified with a State's existence, it must explicitly express its intentions to do so. *Gregory*, 111 S.Ct. at 2401 (citing *Atascadero*, 473 U.S. at 242).

This Court has similarly held that the taxing authority is integral to a State's governing ability and function in our federal system. Of all such areas, state taxation is perhaps the most important. *Taub v. Kentucky*, 842 F.2d 912, 919 (6th Cir. 1988) (quoting *Dawson v. Childs*, 665 F.2d 705, 709 (5th Cir. 1982)). "[This] Court early recognized the need for judicial restraint in matters involving a state's fiscal affairs. *First National Bank v. Board of County Commissioners*, 264 U.S. 450 (1924)." *Id.* Proposition 13 was an amendment to the California constitution. It was adopted by a voter referendum which is the most direct form of democracy. As long as Proposition 13 does not clearly violate the U.S. Constitution, this Court should continue to show its traditional deference toward state tax questions in order to maintain the balance of our federal system.

B. PETITIONER'S POSITION ON PROPOSTION 13 RENDERS STATE BOUNDARIES MEANINGLESS.

If the Court adopts petitioner's reasoning, this Court would be bound to similarly abolish any differences in tax rates in other states. If Proposition 13 is found to violate the equal protection clause or restrict travel into California, then any difference in state tax levels becomes a violation of the equal protection clause or a barrier to travel. If so, the instant case will be recognized as the Supreme Court decision that equalized income tax, sales tax, property tax or any other commonly used form of taxation between states. As stated above, such a decision is an open invitation to every aggrieved land owner to seek a remedy in federal court, and the federal judiciary will need to respond appropriately.

Without the ability to tax independently and free from federal interference, states as states no longer exist. The ability to tax is a defining characteristic of sovereignty. The federal government has traditionally deferred to the states on this matter. Petitioner's position would impede the political process of state government and state referendums. This is petitioner's underlying objective. Petitioner and supporting *amici* argue against Proposition 13 by presenting a multitude of political arguments as "constitutional" issues. It is the *amici* and petitioner who distrust of the California initiative process and have directed this court challenge. Without the voter initiative process, most of the "negative" results that *amici* and petitioner present would not have been implemented. Despite petitioner's and *amici*'s arguments, the voters have maintained and supported the policies to which petitioner and *amici* object. Any reduction in voter accountability strengthens the role of special interests and creates less responsive government. Proposition 13 was a political battle pitting homeowners and small property owners against big business and special interest groups. See, Clarence Y. H. Lo, *Small Property Versus Big Government Social Origins of the Property Tax Revolt*, 81-85, 87-88 (1990). Petitioner's *amici* fall into the category of special interests that opposed Proposition 13 in 1978. League Brief at 2.

A ruling against Proposition 13 by this Court would give a political powerful minority the victory that it has lost at every level — with the electorate in 1978, with the Legislature throughout the 1980s, and the California court system. This Court has been

willing to accept the ruling of the voters in other instances that have involved societal choices within a constitutional framework. This Court has deferred to electorate's choice once it has been demonstrated at the ballot box. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 179-84 (1976); *Miller v. California*, 413 U.S. 15, 24 (1973). In the instant case, petitioner and supporting *amici* claim that if the California voter really understood the impact of Proposition 13, they would repeal the measure. However, the voting results suggest the opposite. Despite clear evidence that the California voter was informed of all of the arguments raised by petitioner and supporting *amici*,[11] the California voters overwhelmingly adopted Proposition 13 and its subsequent amendments. Legislative efforts to lessen Proposition 13's impact have also met with failure. *Cf.* Assessors Brief at 15-17 (records legislative actions to further limit property taxes).

This Court is the final arbitrator of our nation's federal system. Through its careful and discreet judgment, this Court defends our decentralized government and prevents the abuse of power by any single governmental entity. Such a balance has been maintained only by abiding to the wishes of the American people within our constitutional framework. If the Court chooses to waver from its traditional position of granting state tax policies wide latitude, this Court will not only be the final review panel of every state's tax code, but will have upset the "only security against the abuse of power" — our federal system. *McCulloch*, 17 U.S. at 428.

[11] The independent analysis by the California Legislature Analyst which immediately preceded the text of Proposition 13 in the ballot pamphlet, stated that "[a]s a result [of Proposition 13's property tax reassessment method], two identical properties with the same market value could have different assessed values for tax purposes if one of them has been sold since March 1, 1975." California Ballot Pamphlet, June, 1978, Primary Election, 57. Furthermore, in the Rebuttal to Arguments in Favor of [Proposition 13], the opponents clearly stated that Proposition 13 "PLACES a disproportionate and unfair tax burden on anyone purchasing a home after July 1, 1978." *Id.* at 58 (emphasis in original). Opponents continued by stating that "[h]omeowners living in identical side-by-side houses will pay vastly different property tax bills." *Id.* at 59.

V. CONCLUSION

For the foregoing reasons, this Court should reject petitioner's claim and find Proposition 13 constitutional.

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